ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2008

Mr. Chris Jones
Senior Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

OR2008-09319

Dear Mr. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 315554.

The Texas Education Agency (the "agency") received a request for the documents and facts related to an investigation of alleged misconduct by the requestor's client. You state that the agency is redacting some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[2]

Initially, we note that a portion of the submitted investigation notes, which we have marked, was created after the request for information was received. Thus, this information is not

[1] Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information.

[2] We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.103 provides:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The agency has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) that litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) that the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The agency must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You inform us that the agency, as legal counsel for the State Board for Educator Certification (the "SBEC"), is investigating allegations that the requestor's client "solicited or engaged

in an inappropriate relationship with a student."[3] You explain that the SBEC and the agency have "a statutory responsibility to pursue sanctions in this matter" and that the "SBEC may issue sanctions against [the] educator's certificate pursuant to" sections 249.15 and 249.4(a)(1) of title 19 of the Administrative Code. *See* 19 T.A.C. § 249.15(c) (agency staff may commence contested case to sanction teacher's certificate), 249.4(a)(1) (chapter 249 governs disciplinary matters before the SBEC related to sanctions sought against a certificate holder). You also explain that because the educator has not admitted to the underlying basis of the allegations, you expect the matter to be referred to the State Office of Administrative Hearings (the "SOAH"). Furthermore, you state the agency's contested cases are heard by the SOAH and are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. This office has concluded that a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we determine that the agency reasonably anticipated litigation on the date that it received the request for information. Furthermore, upon review of the submitted investigation notes and related documents, we find the information relates to the anticipated litigation because it helps form the basis for the anticipated litigation.

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the requestor or his client is not excepted from disclosure under section 552.103(a), and it must be disclosed. In this instance, the requestor has already seen the request for information letter submitted to the agency. Therefore, this letter may not be withheld under section 552.103. Because you have not raised any other exceptions to disclosure for this letter, it must be released. However, to the extent the requestor or his client has not seen the remaining information, the agency may withhold this information under section 552.103 of the Government Code. We note, however, that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in

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[3] Effective September 1, 2005, SBEC's administrative functions and services transferred to the agency. Educ. Code § 21.035.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

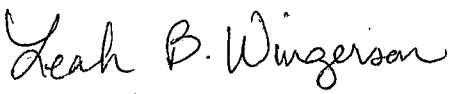
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 315554

Enc. Submitted documents

c: Mr. Tony Conners
2525 Wallingwood Drive
Austin, Texas 78746
(w/o enclosures)